IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.197 OF 2005

Ian Exchange (India) Limited — Petitioners (Org.Defendants)

versus

MSK Projects (India) Ltd. — Respondents (Org.Plaintiffs)

ALONG WITH
SUMMONS FOR JUDGEMENT NO.852 OF 2003
IN
SUMMARY SUIT NO.2294 OF 2003

MSK Projectes (India) Ltd. — Plaintiff

versus

ION Exchange (India) Ltd. — Defendant

Mr.Y.V.Divekar for petitioners & defendants.

Mr.Tarun Modi with Mr.Parikh for respondents and plaintiffs.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 9th August 2005

PC :

1. Heard Mr.Divekar for petitioners and Mr.Modi for respondents.

2. This is a petition under section 8 of the

Arbitration & Conciliation Act. 1996. Petitioners submit that the suit instituted by the respondents is for recovery of a sum of Rs.12,97,529/- with interest @ 6% p.a. from the date of filing of the suit till payment of realisation. By this Arbitration Petition, the petitioners who are original defendants in Summary Suit No.2294 of 2003 pray that the dispute in the suit be referred to arbitration as per Arbitration & Conciliation Act, 1996.

3. It is the case of the petitioners that the claim in the suit is based upon a letter dated 24th December 1997. According to them, this was a Letter of Intent (LOI for short) for civil work on the terms and conditions more particularly set out therein. This LOI is relied upon by the respondents in the plaint. They have also referred to and relied upon the terms and conditions incorporated in the same.

4. Mr.Divekar submits that as per the LOI and the terms and conditions annexed as annexures thereto, it is agreed between the parties that the civil work would be carried out in accordance therewith. Mr.Divekar submits that these terms and conditions of the LOI along with general

terms and conditions are binding upon parties. Mr.Divekar submits that clause 26 of the general terms and conditions provide for reference of the disputes to arbitration as per Indian Arbitration Act, 1940 togetherwith all statutory amendments and modification thereto. The venue of the arbitration is at Mumbai. According to Mr.Divekar, the claim in the summary suit is based on the bills raised for the work entrusted under the LOI.. Respondents claim that they have carried out civil works at the site as per the LOI and the claims are nothing but running bills for the work done under the LOI.. Merely because reliance is placed upon a so called acknowledgement which is annexed at Exhibit-E, it cannot be said that the claim can be proceeded under Order XXXVII of the CPC in the face of a clear agreement to refer the dispute to Arbitration. That apart, on merits, Mr.Divekar submits that the letter does not acknowledge the liability as is sought to be contended on behalf of respondents.

5. Mr.Modi and Mr.Parikh appearing for the original plaintiffs firstly contended that the claim in the suit arises out of a written contract coupled with acknowledgement of

liability. It is maintainable under Order XXXVII of the CPC, 1908. According to them, Order XXXVII of CPC is an exception to the general procedural provisions and some suits could be entertained and decided in summary manner as provided therein. The Legislative intendment in providing for summary disposal of admitted claims ought to be borne in mind while considering the present application. It is not as if the reference to arbitration of summary suits is contemplated in the Arbitration and Conciliation Act, 1996. In their submission, assuming that the claim arises out of LOI and the terms and conditions therein have been relied upon, yet, the provisions of Order XXXVII of the CPC cannot be brushed aside in the present case.

6. Section 8 of the Arbitration & Conciliation Act, 1996 reads as under :-

> "8. Power to refer parties to arbitration where there is an arbitration agreement.- (1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.
>
> (2) The application referred to in sub-section (1) shall not be entertained

> unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.
>
> (3) Notwithstanding that an application has been made under sub section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

Section 8 confers a power on the Court to refer the parties to Arbitration when there is an arbitration agreement. It is not in dispute that there is an arbitration agreement inasmuch as existence of clause 26 is not disputed. Clause 26 (page 35) providing for arbitration, reads thus:-

> "26. Arbitration : In all cases of disputes which cannot be settled by mutual negotiation, the matter shall be referred for arbitration as per Indian Arbitration Act of 1940 and rules thereunder to be read together with all the statutory amendments and modifications of the said Act. The venue of Arbitration proceeding shall be at Mumbai."

7. Sub section 1 of section 8 states that the Judicial Authority before which an action is brought in a matter which is the subject of an arbitration agreement, then it is mandatory for it, if a party applies before it not later than submitting his first statement on the substance

of the dispute, to refer the parties to arbitration. In the present case, the summary suit is filed in this Court. The term "Judicial Authority" is used in Section 8(1). The term "Court" is defined in section 2(e) and naturally the same is clearly contemplated under the term "Judicial Authority". The second requirement is that an action must be brought before such Judicial Authority in a matter which is the subject of an arbitration agreement. In the present case, the summary suit is to recover an amount of Rs.12,97,529/- with interest. In paras 2 and 3 of the plaint a reference is made to the LOI dated 24th December 1997. Nature of work that is to be carried out under this LOI, is also referred to in these paragraphs. After setting out the terms and more particularly payment terms, it is contended by the plaintiffs that they duly completed the civil work at the defendants site and bills were raised on the defendants for the same. Naturally, when I make a reference to the term "plaintiffs" it would mean respondents to this arbitration petition and the defendant is the petitioner before me. It is not in dispute that bills for the work carried out have been raised and demand has been made for payment of the same. Thereafter, a reference is

made to the acknowledgement of the liability and that is how the summary suit is instituted before this Court on 2nd May 2003.

8. I have referred to the plaint averments only with a view to satisfy myself as to whether the stipulations provided in sub section 1 of Section 8 of the Arbitration & Conciliation Act, 1996 have been fulfilled or not. It is not disputed that the subject matter of the arbitration agreement, is also the subject matter of the suit. Clause 26 which is the arbitration agreement incorporated in general terms and conditions is part and parcel of LOI.. Once the stipulation or condition provided in the first part of sub section 1 of section 8 is fulfilled, then all that needs to be done is to find out as to whether the party applying under this provision has applied before submitting it's first statement on the substance of the dispute. About this requirement also there is no dispute inasmuch as on the merits of the claim in the summary suit, petitioners before me (defendants) have not filed first statement on the substance thereof. In my view, therefore, requirements of section 8 are complied with. In AIR-2000-SC-1886 the Hon'ble Supreme Court has observed that the

aforesaid conditions being satisfied, the prayer made u/s 8(1) cannot be rejected.

9. All that now remains to be considered is merely because the respondents have filed a suit under Order XXXVII of the CPC, an application u/s 8 would lie or not. The argument based upon Order XXXVII of CPC being salutary and therefore, out of purview of section 8(1), is entirely misconceived. Section 8(1) in uses word/phraseology "Action". The word "action", according to Law Lexicon has a legal connotation. It is often defined "as a form of suit given by law for recovery of that which is one’s due; or it’s legal demand of a man’s right". The learned author also refers to another meaning of the term as "a litigation in civil court and for recovery of individuals rights or redress of individual wrong, inclusive, in its proper legal sense suits by the crown." Thus, the distinction between the words "action" and "suit" is not generally observed and wherever the term "action" appears it refers to all civil actions. (See Law Lexicon by P.Ramanatha Aiyar, 1997 edition). Order XXXVII of the CPC is part and parcel of CPC, 1908. CPC, 1908 is an Act to consolidate and amend laws relating to the procedure of Courts of

civil judicature. Order XXXVII appears in the same Code. It provides for a summary procedure. A bare perusal of Order XXXVII would show that the same applies to a class of suits which are instituted in Civil Courts by presenting a plaint.

10. It is not possible to agree with the contention of Mr.Parikh that summary procedure provided in Order XXXVII to certain suits being an exception carved out to the general procedural provisions applying Section 8 thereto would be defeating and frustrating the Legislative mandate. Admittedly, Section 8 appears in Arbitration and Conciliation Act, 1996 which is a later Enactment. The Arbitration & Conciliation Act is an Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto. The statement of objects and reasons of this enactment makes it abundantly clear that the enactment is comprehensive piece of Legislation covering international arbitration and conciliation as also domestic arbitration and

conciliation. The whole purpose is to make provision for arbitration procedure which is fair, efficient and capable of application in all specific arbitration. The enactment is aimed at encouraging parties to settle their disputes by taking recourse to Arbitration and conciliation. At the same time, it minimises the role, which is supervisory, of the Court in arbitration process. If the purpose of this enactment is to be achieved, then the interpretation of Section 8 as suggested cannot be accepted. Advisedly, when the Legislature has covered actions before Civil Court in Section 8(1) then it is not permissible to whittle down or dilute the same. The term "Action" must be and needs to be construed broadly to fulfil the abovementioned legislative intent. If summary suits are left out of the purview of Section 8(1) then the purpose of enacting a comprehensive Legislation such as Arbitration & Conciliation Act, 1996, cannot be achieved.

11. In my view, Section 8 would cover suits under Order XXXVII of CPC and It is not permissible to leave them out of it’s purview. In the light of the admitted factual position, it is clear that the petition deserves to succeed.

12. Accordingly petition is made absolute in terms of prayer clause (a). Since the petition is made absolute, the claim in Summary Suit No.2294 of 2003 is referred to Arbitration in terms of clause 26 hereinabove. There will be no order as to costs.

(S.C.DHARMADHIKARI, J.)